Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1995

RICHARD FREDERICKS,
Petitioner,

v.

GARY WRIGHT; GEORGE BURKE; CITY OF FOREST GROVE and JOHN DOE, a fictitious person.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 1995

Question Presented

Whether the Fourteenth and Fourth Amendments, as construed in Illinois v. Rodriguez, 397 U.S. 177 (1990) and Payton v. New York, 445 U.S. 573 (1980), require that a police officer, seeking consent to enter a residence to make an arrest without warrant make some inquiry of the consenter's identity, relationship to the arrestee-householder and/or other authority to consent where the consenter does not volunteer such information?

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Petition for a Writ of Certiorari

Petitioner respectfully prays that the Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported, but is set forth in the Appendix at A-1, et seq.

Jurisdiction

The United States Court of Appeals for the Ninth Circuit is the highest court other than the Supreme Court of the United States in which review may be had in this case. The jurisdiction of this court is based upon 28 U.S.C. § 1254(1).

The effective date of the appellate judgment was January 20, 1995. This petition is filed within 90 days of that date. Rules of the Supreme Court 13.1.

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The Fourth Amendment to the United States Constitution provides, in pertinent

part, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Statement of the Case

Petitioner brought this 42 U.S.C. § 1983 action against Gary Wright and George Burke, police officers of the City of Forest Grove, Oregon; the City of Forest Grove itself; and one "John Doe" defendant, a third Forest Grove police officer, subsequently identified as officer Dunlap. The United States District Court for the District of Oregon granted all Defendants' Motion for Summary Judgment against Plaintiff on the basis that the officers and the city enjoyed qualified immunity because the officers did not violate any clearly established constitutional rights of which a reasonable person would have known. The Circuit Court for the Ninth Circuit affirmed in an unpublished opinion which appears at A-1, et seq.

The facts, summarized from the opinion of the Circuit Court of Appeals are as follows:

On the evening of March 21, 1992, officers Burke and Wright and a third officer whose name is unknown, all in uniform, went to the home of petitioner Fredericks, whom at least Burke and Wright knew on sight, intending to arrest him

without warrant, on felony charges.[1] The Court of Appeals noted that although there was a factual dispute about what happened next,

> * * * it did not create a genuine issue of material fact because no violation of a clearly established right occurred under either scenario. Fredericks v. Wright, et al., No. 94-35494, A-5.

Only one version of the facts, the so-called "foyer" version given largely in officer Burke's deposition, will be given here because if this court agrees that it does present a violation of a clearly established right, petitioner is entitled to reversal of the order granting summary judgment and the opportunity to see whether a jury would accept that version rather than the other.

According to officer Burke, he knocked on the door of Fredericks' home. Fredericks' friend and dinner guest, Thompson, answered the door and Burke asked if the officers (who were visible through the door's glass) could come in. Thompson said they could. Once inside, Burke asked if Fredericks was there, but before Thompson could answer, Fredericks appeared and asked, "How can I help you?" Burke then placed him under arrest.

While being placed under arrest,

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[1] All charges were dismissed with prejudice and the record expunged.

Fredericks asked Burke if he possessed a warrant. Burke stated that he did not need a warrant.[2] There was no exigency.

Reasons for Granting the Writ

Illinois v. Rodriguez, 497 U.S. 177, 189 (1990), holds that where an officer relies upon the "apparent authority" of one on the premises to consent to the officers' entry to effect a warrantless arrest or search, the officer must make some reasonable inquiry into the consenter's authority and/or relationship to the occupant unless that authority is patent. In this case, the United States Court of Appeals for the Ninth Circuit held no such inquiry necessary even where the consenter's only "apparent authority" is (a) his presence at the door, and (b) his invitation to enter. This places the Court of Appeals for the Ninth Circuit in conflict with its sister Courts of Appeal for the Second Circuit (United States v. Brown, 961 F.2d 1039 (C.A.2 1992)), Sixth Circuit (United States v. Hall, 979 F.2d 77 (C.A.2 1992)), and Tenth Circuit (United States v. Whitfield, 939 F.2d 1071 (C.A.D.C. 1991), as well as in arguable conflict with its own pre-Illinois v. Rodriguez, 397 U.S. 177 (1990), cases requiring such inquiry where the consenter's authority was ambiguous (United States v. Hamilton, 792 F.2d 837 (C.A.9 1986) and United States v. Sledge, 650 F.2d 1075 (C.A.9 1981), per then-Circuit Judge Kennedy).

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[2] Telephone warrants are available. During depositions, officer Burke stated that their policy was not to secure telephonic warrants.

Before Illinois v. Rodriguez, supra, consent to enter a residence by a guest or brief visitor in the home, given to a uniformed police officer to arrest or search without warrant (although with probable cause) was generally not allowed by the Federal Courts. United States v. Mahoney, 712 F.2d 956 (C.A.5, 1983), cert. den., 486 U.S. 1220 (1984) (Brennan and Marshall, JJ., dissenting) (applied "good faith" exception to officer's mistaken belief that consent was valid); United States v. Harris, 534 F.2d 95 (C.A.7, 1976); but cf., United States v. Turbyfill, 525 F.2d 57 (C.A.8, 1975) (long term visitor's wordless opening of front door held implied invitation to enter.) The state cases usually followed the same rule.[3]

Since Illinois v. Rodriguez, 397 U.S. 177 (1990), however, where such consent is allowed by the court upon the basis that the guest or infrequent visitor had "apparent authority" to consent under Illinois v. Rodriguez, supra (as the court here purported to do: Fredericks v. Wright, et al., No. 94-35494. Memorandum Opinion A-8-9), the court further requires that officers make some inquiry into the consenter's authority.

Even when the

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[3] People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939); People v. Wagner, 104 Mich. App. 169, 304 N.W.2d 517 (Mich. Ct. App. 1981); State v. Manns, 220 Neb. 426, 370 N.W.2d 157 (1985); State v. McGovern, 77 Wis.2d 203, 252 N.W.2d 365 (1977); contra, People v. Shaffer, 67 Ill. Dec. 612, 111 Ill. App.3rd 1054, 444 N.E.2d 1096 (Ill. App. Ct. 1982).

> invitation [to enter] is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. Illinois v. Rodriguez, supra, 397 U.S. at 188.

And, certainly, it is a reasonable inference from this that such "further inquiry" is required where the consenter denies living there or is totally silent about whether he lives there or not, as was the case here. (Fredericks v. Wright, et al., No. 94-35494, Memorandum Opinion A-7.)

All of the Circuit Courts of Appeal which have applied Illinois v. Rodriguez,397 U.S. 177, since its rendition have required such an inquiry where the consenter's identity and/or authority were unclear. United States v. Hall, 979 F.2d 77 (C.A.6 1992); United States v. Brown, 961 F.2d 1039 (C.A.2 1992); United States v. Salinas-Cano, 959 F.2d 861 (C.A.10 1992); United States v. Whitfield, 939 F.2d 1071 (C.A.D.C. 1991). As the court stated in the latter case,

> "[i]t is the government's burden to establish that a third party had authority to consent to a search [or entry to arrest]. [Illinois v. Rodriguez, 497 U.S. at 181.] The

> burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry." United States v. Whitfield, supra, 939 F.2d at 1075.[4]

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[4] See, as anticipating the Illinois v. Rodriguez requirements of reasonable inquiry, such earlier Ninth Circuit cases as United States v. Hamilton, 792 F.2d 837 (C.A.9 1986) and United States v. Sledge, 650 F.2d 1075 (C.A. 9 1981), per then Circuit Judge Kennedy. In the present case, the court purported to rely upon both United States v. Hamilton, supra, and United States v. Sledge, supra [Fredericks v. Wright, et al., No. 94-35494 Memorandum Opinion, A-8] but relied upon Thompson's failure to "indicate that he was a guest in this house." This puts the burden of proof upon defendant to show "lack of apparent authority". This is contrary to all known burden of proof requirements as well as the express holding of Illinois v. Rodriguez, supra, that

> [*] burden of establishing * * * common authority [or consent] rests upon the state. 497 U.S. at 181.

United States v. Yarborough, 852 F.2d 1522 (C.A.9 1988), cert. den., 488 U.S. 866 (1988), also relied upon by the court here (Fredericks v. Wright, et al, No. 94-35494, Memorandum Opinion, A-8) was one in which

Indeed, the requirement of an inquiry into the consenter's authority to consent would seem to be implicit in Payton v. New York, 445 U.S. 573 (1980) itself. In Payton, four officers knocked at the door of one Riddick, a suspect in the commission of two armed robberies. Apparently, they had probable cause to arrest, but had no warrant.[5] Riddick's door was answered by his 3-year old son and, with the door opened, officers saw Riddick inside, entered and placed him under arrest. Payton v. New York, 445 U.S. 573 at 579 and 584. The Supreme Court reversed with no particular discussion on that issue.

Professor LaFave discusses this aspect of Payton v. New York as follows:

> In one type of case police entry of the premises is not necessary to determine that the person to be arrested is there, as where the door is already open or if opened by someone else in response to the

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the consenter had actual authority; an actual authority which was clear and unambiguous. Hence, no further inquiry was necessary.

[5] According to Fredericks' Deposition, when Thompson was asked if Officer Burke had a warrant, the officer said, "No. I don't need one." Exhibit A, p.1, to Plaintiffs' Opposition to Defendants' Motion For Summary Judgment.

> police knock, the police see the intended arrest within. If the police then enter in order to make the arrest, this activity falls within the Payton-Steagald [Steagald v. United States, 451 U.S. 204 (1981)][6] warrant requirement." 2 LaFave Search and Seizure 588-89 (1987); emphasis added.[7]

This is the case Professor LaFave has written about and unless "apparent

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[6] Steagald v. United States, supra, involved entry of defendant's premises to search for a person other than the defendant himself and, thus, is not directly germane to the present discussion.

[7] In support of his view that Payton v. New York, supra, requires either a warrant or consent to cross the threshold of a suspect's door, Professor LaFave cites United States v. Johnson, 626 F.2d 753 (C.A.9 1980), aff'd on other grounds, 457 U.S. 537 (1982). But the Ninth Circuit's holding that entry was non-consensual in that case depended upon the fact that Johnson opened his front door only after Secret Service agents had knocked, identifying themselves by fictitious names. The court in this case properly distinguished United States v. Johnson, supra, upon that basis. Fredericks v. Wright, et al., No. 94-35494, Memorandum Opinion A-6, footnote 1.

authority" under Illinois v. Rodriguez, 497 U.S. 177 (1990) as construed in this case is to swallow Payton v. New York, 445 U.S. 573 (1980), as well as its progeny, to say nothing of Illinois v. Rodriguez's own requirement of reasonable inquiry, review should here be granted. Since the burden, here as always, is upon the government to demonstrate the "reasonableness" of the warrantless entry and arrest, it follows that the officers should know why they believed the consenter to have "apparent authority". And where, as here, the consenter's only "apparent authority" derives from (a) his mere presence and (b) his opening of the door, further inquiry should be required. To do otherwise would be to validate any consent (express or implied) if given by any adult[6] on the premises other than a patent trespasser- e.g., one wearing a ski mask, burglar tools dangling from his pockets!

Conclusion

It is fundamental that the state has the burden to show that any entry into the home is "reasonable". Consent satisfies this burden. But if the "apparent authority" of just any old person on the premises is assumed, the Constitutional requirement of "reasonableness" vanishes. Police who rely upon "apparent authority" should be required to rely upon just that - rather than "apparent absence of lack of authority". The shoe should be on the proper foot. The police should know why they are relying on "apparent authority",

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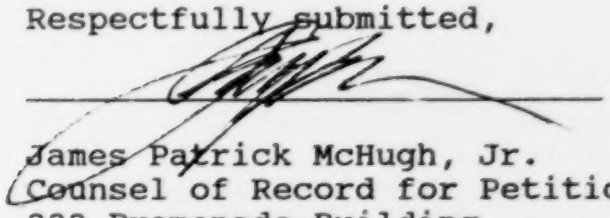
[6] Or, perhaps, any child. See, Payton v. New York, 445 U.S. 573, 579 and 584 (1980).

and they should know why they believe the consenter to have such authority. In a case such as this, they should be required to make some reasonable inquiry into the consenter's relationship with the householder. This is the position taken by the Courts of Appeal for the Second, Sixth, Tenth and District of Columbia Circuits.[7] That position conflicts with the position taken by the Court of Appeals for the Ninth Circuit in this case. Certiorari should be granted to resolve that conflict; ideally, in petitioner's favor.

Respectfully submitted,



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[7] See cases cited at p. 6, supra.